Venetian Casino Resort, LLC *and* Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union. Case 28–CA–016000

February 5, 2018

THIRD SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE AND MCFERRAN

This case is before us once again on remand from the United States Court of Appeals for the District of Columbia Circuit to determine whether the Respondent violated Section 8(a)(1) of the National Labor Relations Act when it summoned police officers to remove individuals engaged in a peaceful union demonstration from a sidewalk situated on the Respondent's property.

This is the third time the National Labor Relations Board has addressed this issue. In its first decision, issued in 2005, the Board found three alleged Section 8(a)(1) violations, based on the protected character of the union demonstration under Section 7 of the Act and a Ninth Circuit decision finding the sidewalk where the demonstration took place to be "'a public forum subject to the protections of the First Amendment.'" 345 NLRB 1061, 1061 (2005) (quoting *Venetian Casino Resort v. Local Joint Executive Board of Las Vegas*, 257 F.3d 937, 948 (9th Cir. 2001), cert. denied 535 U.S. 905 (2002)). Specifically, the Board found that the Respondent violated the Act by (1) summoning the police to cite the demonstrators for trespass and to block them from the walkway; (2) playing a trespass warning over a loudspeaker system; and (3) attempting to place union agent Arnodo under "citizen's arrest." The Respondent filed a petition for review in the District of Columbia Circuit, and on May 8, 2007, that court issued its first decision in this case. See *Venetian Casino Resort, LLC v. NLRB*, 484 F.3d 601 (D.C. Cir. 2007), cert. denied 552 U.S. 1257 (2008). The court upheld the Board's determination that the demonstrators were engaged in Section 7 activity and that the Respondent's actions in playing the trespass warning and attempting a "citizen's arrest" were unlawful. The court also agreed with the Board that summoning the police to remove the demonstrators interfered with their Section 7 rights. Id. at 610. The court remanded the case to the Board, however, to determine whether the Respondent's summoning of the police, although otherwise unlawful, was protected by the First Amendment under the *Noerr-Pennington* doctrine.[1] Id. at 614. The Respondent subsequently complied fully with notice-posting requirements for the two actions found unlawful.

On December 21, 2011, 6 years after its first decision, the Board issued a Second Supplemental Decision and Order in this case. 357 NLRB 1725 (2011). The Board found that the Respondent's summoning of the police was not protected by the First Amendment on the basis that it "did not constitute direct petitioning within the meaning of the *Noerr-Pennington* doctrine." Id. at 1725. Accordingly, the Board reaffirmed its earlier conclusion that by summoning the police to remove the union demonstrators from its sidewalk, the Respondent violated Section 8(a)(1). Id. at 1728.

Once again, the Respondent filed a petition for review in the District of Columbia Circuit, and on July 10, 2015, that court issued its second decision in this case. *Venetian Casino Resort, LLC v. NLRB*, 793 F.3d 85 (D.C. Cir. 2015). Disagreeing with the Board, the court found that the Respondent's act of summoning the police qualified as direct petitioning of the government shielded from liability under the *Noerr-Pennington* doctrine unless it was "sham petitioning." 793 F.3d at 92. As the court explained,

> the *Noerr-Pennington* doctrine does not cover activity that was not genuinely intended to influence government action. In other words, while genuine petitioning is immune from Section 8(a)(1) liability under the *Noerr-Pennington* doctrine, sham petitioning is not. A petition is a sham if it is objectively baseless and is brought with the specific intent to further wrongful conduct through the use of governmental process.

Id. (internal citations and quotation marks omitted). The District of Columbia Circuit remanded the case to the Board to consider in the first instance whether the Respondent had engaged in sham petitioning. Id. On October 2, 2015, the Board notified the parties that it had accepted the remand and invited them to file position statements. Only the Respondent filed a position statement.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[1] See *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). The *Noerr-Pennington* doctrine protects otherwise illegal activity that nevertheless constitutes a genuine "'attempt to persuade the legislature or the executive to take particular action.'" *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 56 (1993) (quoting *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. at 136).

The central events underlying this case occurred on March 1, 1999, over 18 years ago. As discussed above, those events and the controversies leading up to them have now been considered, not only in this proceeding before the Board and the District of Columbia Circuit, but also in Federal civil litigation between the Respondent and the Union culminating in a decision of the Ninth Circuit and the Supreme Court's denial of the Respondent's request for certiorari. Considering the unusual circumstances of this case, including the very long passage of time since the underlying events occurred and the considerable administrative resources already consumed, we find that it would not effectuate the purposes of the Act to resolve the remaining legal question whether the Respondent's summoning of the police constituted sham petitioning and likely prolong what has already been extraordinarily protracted litigation. In particular, we observe, again, that the underlying events here occurred over 18 years ago and that the Respondent has fully implemented the remedies for the Board's unfair labor practice findings that were enforced by the District of Columbia Circuit, which included orders to cease and desist from playing a trespass message directed at peaceful union demonstrators, to cease and desist from informing them that they are being placed under citizen's arrest, and to cease and desist from engaging in any like or related conduct. Further, there has been no showing or suggestion that Respondent has repeated its unlawful conduct in the long intervening period and following the latest remand from the District of Columbia Circuit. We thus conclude that by imposing those remedies, and requiring the Respondent to post a notice affirming its commitment to abide by them, we substantially affirmed the rights of individuals engaged in Section 7 activities on the sidewalk in front of the Respondent's facility, and that further action in this case would not effectuate the purposes of the Act.

ORDER

The Board's Order, reported in 345 NLRB 1061 (2005), is modified by deleting paragraph 1(a) and relettering the subsequent paragraphs.

Dated, Washington, D.C. February 5, 2018

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Marvin E. Kaplan, Chairman

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD